

**§ 26.35 Disqualification of ALJ.**

(a) An ALJ in a particular case may disqualify himself or herself.

(b) A party may file with the ALJ a motion for the ALJ's disqualification. The motion shall be accompanied by an affidavit alleging the grounds for disqualification.

(c) Upon the filing of a motion and affidavit, the ALJ shall proceed no further in the case until the matter of disqualification is resolved.

(d) If the ALJ does not withdraw from the proceedings, a written statement of his or her reasons for electing not to withdraw shall be incorporated into the record and the hearing shall proceed.

## PARTIES

**§ 26.36 Parties to the hearing.**

(a) *General.* The parties to the hearing shall be the respondent and HUD.

(b) *Rights of parties.* Except as otherwise limited by subpart B of this part, all parties may:

- (1) Be accompanied, represented, and advised by a representative;
- (2) Participate in any conference held by the ALJ;
- (3) Conduct discovery;
- (4) Agree to stipulations of fact or law, which shall be made part of the record;
- (5) Present evidence relevant to the issues at the hearing;
- (6) Present and cross-examine witnesses;
- (7) Present oral arguments at the hearing as permitted by the ALJ; and
- (8) Submit written briefs and proposed findings of fact and conclusions of law after the hearing, as permitted by the ALJ.

**§ 26.37 Separation of functions.**

No officer, employee, or agent of the Federal Government engaged in the performance of investigative, conciliatory, or prosecutorial functions in connection with the proceeding shall, in that proceeding or any factually related proceeding under subpart B of this part, participate or advise in the decision of the Administrative Law Judge, except as a witness or counsel during the proceeding, or in its appellate review.

## PREHEARING PROCEDURES

**§ 26.38 Commencement of action.**

Proceedings under subpart B of this part shall commence with the Government's filing of a complaint, as that term is defined in § 26.29, with the Docket Clerk. The respondent's response to the complaint shall be timely filed with the Docket Clerk and served upon the Government in accordance with the procedures set forth in the complaint. If the respondent fails to submit a response to the Docket Clerk, then the Government may file a motion for a default judgment in accordance with § 26.41.

**§ 26.39 Prehearing conferences.**

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party or *sua sponte*, the ALJ may schedule a prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may consider the following at a prehearing conference:

- (1) Simplification of the issues;
- (2) Stipulations of fact and of the authenticity, accuracy, and admissibility of documents;
- (3) Submission of the case on briefs in lieu of an oral hearing;
- (4) Limitation of the number of witnesses;
- (5) The exchange of witness lists and of proposed exhibits;
- (6) Discovery;
- (7) The time and place for the hearing; and
- (8) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

**§ 26.40 Motions.**

(a) *General.* All motions shall state the specific relief requested and the basis therefore and, except during a conference or the hearing, shall be in writing. Written motions shall be filed and served in accordance with § 26.30. Either party may submit a proposed order with any motion.

(b) *Response to motions.* Unless otherwise ordered by the ALJ, a response to a written motion may be filed within 10 days after service of the motion. A party failing to respond timely to a motion may be deemed to have waived

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any objection to the granting of the motion.

(c) *Motions for extensions.* Either party may file a motion for extension. At the discretion of the ALJ, a motion for an extension of time may be granted for good cause at any time, notwithstanding an objection or any reply to the motion, consistent with § 26.32(f). The ALJ may waive the requirements of this section as to motions for extensions of time or any page limits.

(d) *Right to reply.* The moving party shall have no right to reply, except as permitted by the ALJ.

(e) *Oral Argument.* Either party may request oral argument on any motion, but such argument shall be available at the sole discretion of the ALJ.

(f) *Motions for summary judgment.* (1) A party claiming relief or a party against whom relief is sought may timely move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(2) Objections in the consideration of summary judgment motions or answers thereto based upon a failure to strictly comply with the provisions of Rule 56 of the Federal Rules of Civil Procedure may, at the discretion of the ALJ, be overruled.

(g) *Motions for dismissal.* When a motion to dismiss the proceeding is granted, the ALJ shall make and file a determination and order in accordance with the provisions of § 26.50.

## § 26.41 Default.

(a) *General.* The respondent may be found in default, upon motion, for failure to file a timely response to the Government's complaint. The motion shall include a copy of the complaint and a proposed default order, and shall be served upon all parties. The respondent shall have 10 days from such service to respond to the motion.

(b) *Default order.* The ALJ shall issue a decision on the motion within 15 days after the expiration of the time for filing a response to the default motion. If a default order is issued, it shall constitute the final agency action.

(c) *Effect of default.* A default shall constitute an admission of all facts alleged in the Government's complaint and a waiver of respondent's right to a hearing on such allegations. The pen-

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alty proposed in the complaint shall be set forth in the default order and shall be immediately due and payable by respondent without further proceedings.

### DISCOVERY

## § 26.42 Discovery.

(a) *General.* The parties are encouraged to engage in voluntary discovery procedures, which may commence at any time after an answer has been filed. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the ALJ may order discovery of any matter relevant to the subject matter of the action. To be relevant, information need not be admissible at the hearing, if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. Each party shall bear its own expenses associated with discovery.

(b) *Discovery in Program Fraud Civil Remedies Actions.* (1) Upon receipt of a complaint, the defendant may, upon written request to the Office of General Counsel, review any relevant and material nonprivileged documents, including any exculpatory documents, that relate to the allegations set out in the complaint. Exculpatory information that is contained in a privileged document must be disclosed; however, the privileged document need not be provided.

(2) With the exception of the limited discovery permitted under paragraph (b)(1) of this section, unless agreed to by the parties, discovery shall be available only as ordered by the ALJ. The ALJ shall order only that discovery that he or she determines is necessary for the expeditious, fair, and reasonable consideration of the issues, is not unduly costly or burdensome, and will not unduly delay the proceeding. Discovery of privileged information shall not be permitted. The request for approval sent to the Attorney General from the General Counsel or designee, as described in 31 U.S.C. § 3803(a)(2), is